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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOAN V. HARRIS,
Petitioner,

v.

PAUL HIRSH,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES — Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 702 (1985) 5
Fox v. Parker Hannifin Corp., 914 F.2d 795 (6th Cir. 1990) 6
Hawaiian Airlines v. Norris, 114 S. Ct. 2239 (1994) 1, 2, 6
Hirras v. National R.R. Passenger Corp., 39 F.3d 522 (5th Cir. 1994) 6, 7
Lingle v. Norge Division of Magic Chef, 486 U.S. 399 (1988) 2, 5
Livadas v. Bradshaw, 114 S. Ct. 2078 (1994) 5
Local No. 57 v. Bechtel Power Corp., 834 F.2d 884 (10th Cir. 1987) 6
O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989) 6
Tellez v. Pacific Gas and Electric Co., Inc., 817 F.2d 536 (9th Cir. 1986) 6

STATUTES

Labor Management Relations Act, 29 U.S.C. § 185, *et seq.* ..... *passim*
Railway Labor Act, 45 U.S.C. § 151, *et seq.* ..... *passim*

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ARGUMENT

1. a) The one paragraph in Respondent's Brief in Opposition ("Resp. Br.") addressed to our showing that the New York Court of Appeal's decision is inconsistent with this Court's subsequent decision in *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), and should be vacated and remanded on that ground is devoid of substance.

Respondent concedes that vacation and remand in the situation here "might [be] appropriate had the petitioner come directly to this Court." Resp. Br. at 7. But respondent asserts that where a petition for rehearing is filed with the lower court to afford that court a chance to correct its subsequently revealed error—and the lower court denies rehearing without opinion—the denial is somehow binding on this Court.

That assertion is so contrary to the basic proposition that lower court decisions on federal questions *never* bind this Court, and to the salutary policy recommending that parties call to a lower court's attention an error revealed by a later decision of this Court so as to give the lower court a *locus penitentiae,* as to be frivolous.

b) As to respondent's vague suggestion that the text of the New York Court's decision refutes our claim that the decision rests on the broad Railway Labor Act "labor contract" preemption doctrine discredited in *Hawaiian Airlines,* it suffices, we believe, to quote that court's words most directly in point:

> Along with a number of courts that have addressed the issue, we conclude that the preemptive effect of the RLA is more pervasive than the preemptive effect of the Labor Management Relations Act, 29 U.S.C. § 185 *et seq.* . . . Accordingly, we reject plaintiff's claim that the test for preemption under section 301 of the LMRA (29 U.S.C. § 185) established in *Lingle v. Norge Div. of Magic Chef* (486 U.S. 399 [1988]) . . . governs this case. [Pet. App. 6a-7a.]

As we demonstrated in our opening submission, this holding simply cannot stand in light of *Hawaiian Airlines,* which holds that "*Lingle* provides the appropriate framework for addressing preemption under the RLA, and we adopt the *Lingle* standard to resolve claims of RLA preemption." 114 S.Ct. at 2249.

2. Respondent's principal argument is that "petitioner's claim [was] correctly held preempted under even the narrowest interpretation of preemption under the *Lueck/Lingle/Hawaiian Airlines* standard." Resp. Br., First Question Presented. This argument is fashioned out of bits and shards that misrepresent the facts of this case and misstate the law.

a) Respondent asserts that this case is in substance a breach of contract action disguised as a tort suit, the kind of case that presents the most straightforward need for labor contract preemption. Specifically, respond-

ent asserts that this case is a "grievance" about whether a Metro-North supervisor was within his authority and acted "pursuant to his duties with respect to 'Rule G,' an industry-wide rule prohibiting substance abuse," Resp. Br. at 2, when he called petitioner into his office based on his suspicion that she was abusing drugs. And, respondent concludes, "the jury's verdict can only be understood as deciding . . . that Metro-North needed some quantum of suspicion in order to closely question an employee concerning drug use" under Rule G. Resp. Br. at 5.

In each particular, these factual representations are made of whole cloth. There was a trial and there is a trial transcript. And the following is all beyond dispute: At trial the plaintiff did *not* accuse the defendant of violating contractual (or, for that matter, unilaterally imposed) rules about drug abuse or supervisory authority. At trial, the defendant *never* defended his conduct on the ground that he was following contractual or company rules. At trial, the "longstanding industry practice to rely upon supervisory observation as a means of enforcing Rule G," Resp. Br. at 2, was *not* the subject of any testimony. To the contrary, at trial, Rule G itself was *never* discussed or even mentioned, and the charge to the jury contained *not* a single reference either to Rule G, Metro North's substance abuse policy, or the labor agreement in place between Metro North and petitioner's union.

Harris' case was *not* that her rights under her labor agreement, or unilaterally imposed company policy, had been violated, but that Hirsh maliciously made false and slanderous allegations against her in the presence of other people. Far from being the "centerpiece" of Harris' trial strategy, Resp. Br. at 11, at trial a grand total of *one question* was taken up with the subject of the relationship between Hirsh's slanderous statements and the labor agreement. And, in response to that one question, Hirsh testified that he was not familiar with the relevant portions of the agreement. The subject was not raised again in the testimony, the jury instruction or in the closing arguments.

By the same token, Hirsh's defense at trial was *not* that he "suspected petitioner was using drugs," Resp. Br. at 1, and was merely following Rule G when he called Harris into his office. To the contrary, his defense was that he did *not* suspect her of drug use, and that he never made the slanderous comments attributed to him by Harris. Trial Transcripts A-367, A-324-327.

In sum, respondent's asservations to the contrary, this was no more a contract case in substance than it was in form. It was a run of the mine defamation action, albeit one that was set in the workplace, and in particular in a unionized workplace.

b) Respondent's opposition—to the extent it is not grounded on a mischaracterization of the facts—is grounded on the equally profound mischaracterization of the governing federal law adopted by the New York Court of Appeals. It is that legal error that generates that court's conclusory statements set out at such length at Resp. Br. at 6. And it is that legal error that has generated the deep division in the lower courts that can only be closed by review in this Court.

The style of the theory on the other side is this: A labor agreement gives the company through its supervisory personnel certain rights. Where a state law tort case concerns the exercise of such rights, the outcome must turn "on the reach of defendant's authority under the [labor agreement]." Resp. Br. at 8. For that reason alone, it is argued, the outcome of such cases is "inextricably intertwined" with labor contract questions, and so "clearly preempted by the settled core of *Lueck* and *Lingle*." *Id.* *See also id.* at 11, 14. Or, as the New York Court put it, a state law tort case is fundamentally contractual where "in rendering its verdict, the jury . . . was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract, and whether he exceeded the scope of that privilege." Pet. App. 8a.

This method of approach, respondent argues, is what brings the case snugly within the rule of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and *Lingle, supra.* In fact, *Lueck* and *Lingle reject* any such approach.

If state law *unqualifiedly* outlaws *malicious* slanders, as does the law of New York and every other state of which we are aware, we submit it is entirely irrelevant for "labor contract" preemption purposes whether a labor agreement might or might not purport to "privilege" the conduct. As this Court said in *Lueck* the federal law of collective bargaining does "not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." 471 U.S. at 212.

Federal labor law, we submit, no more affirmatively protects malicious slanders in the workplace—whatever the wording of a labor agreement—than it protects other wrongful and illegal tortious conduct in that setting. And once the contrary—false—predicate of respondent's position is exposed, nothing is left of respondent's argument that this petition should be denied because this case is fundamentally contractual.[1]

c) Respondent's final argument against review is that there is no circuit conflict concerning "labor contract" preemption, this Court's recent statement to the contrary notwithstanding. *See Livadas v. Bradshaw,* 114 S. Ct. 2068, 2078, n.18 (1994).

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[1] We hasten to add that in evaluating whether a plaintiff has established malice, as in any other inquiry involving motive, the fact-finder might consider arguments that the defendant was motivated by some other, proper, purpose, in publishing his remarks. In a unionized workplace, a defendant might well claim that he was motivated solely by a desire to follow the labor agreement (although in this case Hirsh did not so claim). But as this Court held in *Lingle,* such reference to the labor agreement does not require preemption, because collateral use of the labor agreement to help prove proper motive is a "purely factual inquiry [that] does not turn on the meaning of any provision of a collective-bargaining agreement." 486 U.S. at 407.

First, respondent asserts that the Sixth and Tenth Circuit cases upon which we relied are inapposite because all are removal cases, and not preemption cases. *See* Resp. Br. at 19-20. This is simply not so; each of the cases we cite is a preemption case.[2]

Second, respondent asserts that in any event there is no split involving *defamation* torts. Resp. Br. at 16, 18. This assertion is both untrue and irrelevant. In *Tellez v. Pacific Gas and Elec. Co., Inc.*, 817 F.2d 536 (9th Cir. 1986), the Ninth Circuit found *not* preempted a state law libel suit brought by a unionized employee against his employer alleging that the employer's supervisors defamed him by falsely accusing him of drug use. That court held that "one can sue for defamation regardless of employment status or union membership." *Id.* at 538.

At least equally to the point, respondent never explains why *defamation* claims comprise a separate class for this purpose rather than being one part of the larger class of organized-employee-state-tort-claims that most certainly has generated conflict and confusion in the lower court law.

At the risk of belaboring the obvious, the holding of the most recently decided federal court of appeals case in this area could not be more inconsistent with the holding of the New York Court here. In *Hirras v. National R.R. Passenger Corp.*, 39 F.3d 522 (5th Cir. 1994), after a remand from this Court for reconsideration in light of *Hawaiian Airlines, supra*, the Fifth Circuit held that an intentional infliction of emotional distress claim is *not* preempted by the Railway Labor Act. The em-

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[2] *See O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989) ("because the plaintiff's claims are independent of the contract, they are not preempted"); *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 801 (6th Cir. 1990) ("the tortious interference with contracted relations claim falls beyond the preemptive reach of section 301"); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 890 (10th Cir. 1987) ("we hold that plaintiffs' blacklisting claims are not preempted by § 301 of the LMRA").

ployer there argued unsuccessfully that the claim should be preempted because proving "extreme and outrageous" conduct "turns on what standard [the employer's supervisors] were expected to meet under the CBA." 39 F.3d at 527. That argument is on all fours with the argument that the court below *adopted* in the instant case, *viz.* that a finding of malice turns on what standard was expected under the labor agreement. And in *Hirras*, the Fifth Circuit rejected the employer's argument, concluding that so long as "the claim is brought under state law without any reference to the CBA, then it is not preempted." *Id.* at 526. That decision is squarely in conflict with the New York Court's decision in the instant case.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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